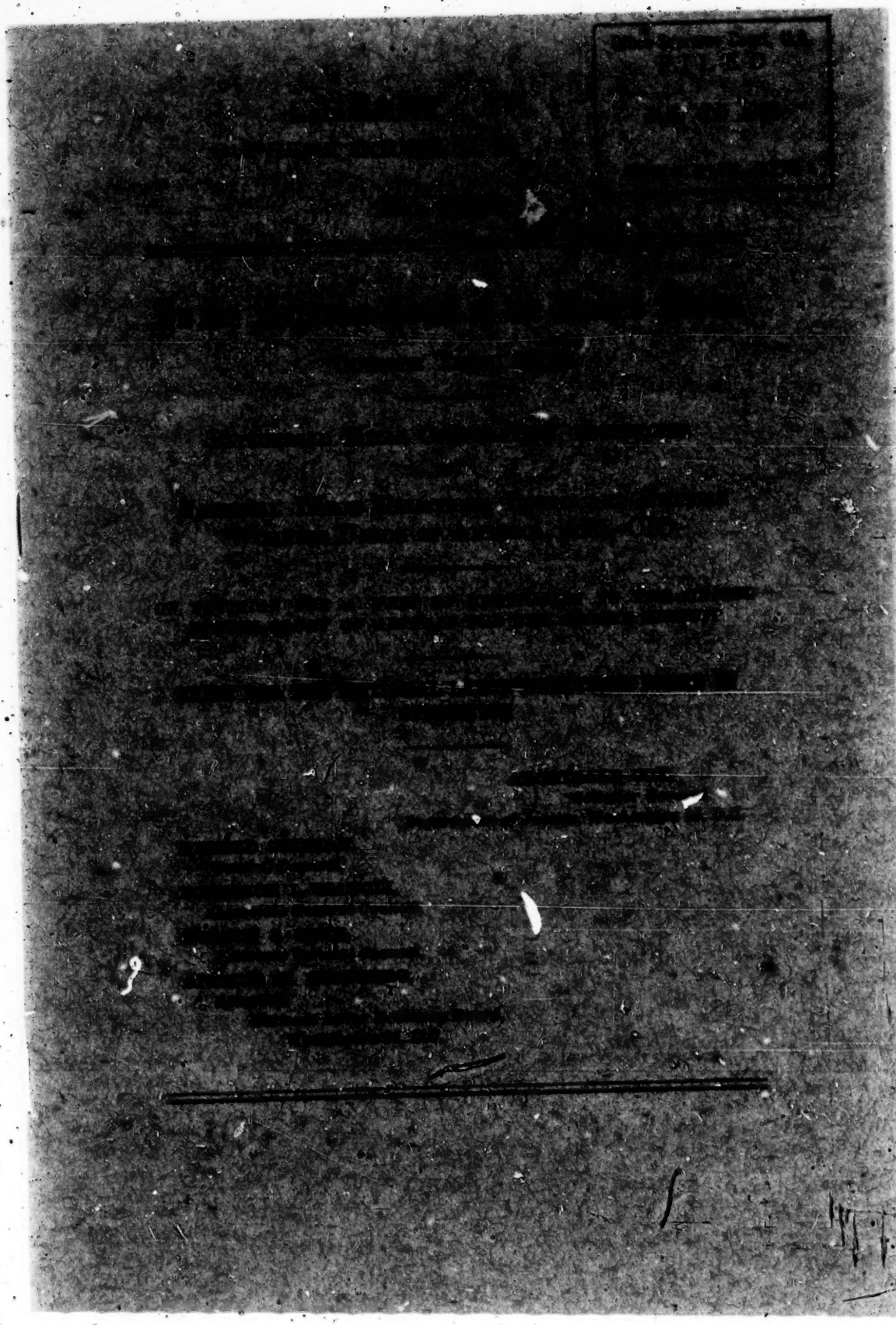

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1109

FITZGERALD MILLS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–43) is reported at 313 F. 2d 260. The findings of fact, conclusions of law and order of the Board (J.A. 727–754)[1] are reported at 133 NLRB 877.

JURISDICTION

The decree of the court of appeals (Pet. 44–45) was entered on February 8, 1963, and a petition for rehearing *en banc*, filed by petitioner, was denied on

[1] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition; reference preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

February 25, 1963 (Pet. 2). The petition for writ of certiorari was filed on May 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the petitioner refused to bargain in good faith with the collective bargaining agent of its employees.

2. Whether the court of appeals was required to remand the case to the Board when it rejected certain of the Board's subsidiary findings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at pp. 18–19 of the petition.

STATEMENT

I.

THE BOARD'S FINDINGS OF FACT

A. PETITIONER'S DILATORY TACTICS AND REFUSAL TO FURNISH REQUESTED INFORMATION

Petitioner operates a cotton mill in Georgia for the manufacture and sale of textiles (J.A. 756). The Union has been exclusive bargaining representative of petitioner Company's employees since 1952 (J.A. 757; 460, 4). The latest contract between the parties was executed March 25, 1957, and was subject to termination on March 25, 1959, upon sixty days' notice by either party (J.A. 757; 561, 577–578).

In the fall of 1958, the Union requested information from the Company relevant to the administration of the existing contract and the negotiations of a new agreement (J.A. 728, 757–758, 9–10, 5, 94). By letter dated September 23, 1958, the Union complained of the Company's failure to supply wage information, job descriptions and a seniority roster; of workload changes made without negotiation; of unilateral change in insurance benefits; of failure to comply with an arbitration award; and of failure to advise the Union as to which jobs were temporary and which permanent (J.A. 757–758; 579–580). The Company agreed, on November 11, to furnish the information requested, as well as a copy of the new insurance policy and to negotiate all future workload changes. (J.A. 728–729, 758, 581–583). The letter stated that the requested wage rate and job description data were in preparation (*ibid.*). Late in November, the Union complained again of the Company's failure to supply any of the promised information and asked when it could be expected. E. O. Clark, the Company's general manager, replied he "didn't know, * * * because he was busy trying to run a mill and * * * couldn't be troubled with this extraneous business" (J.A. 729; 11–12). The Union also requested the "social security earnings" of "dollar twisters" (J.A. 729; 11).

The Union filed refusal to bargain charges with the Board in December, 1958, alleging as an unfair labor practice the Company's continued failure to supply the requested information (J.A. 759; 12–13, 585). An incomplete list of wage rates and job descriptions

was supplied by the Company on January 19, 1959, whereupon the Union withdrew its charge (J.A. 728–729, 758–759; 588, 13, 15).[2] However, on February 11, the Union pointed out the deficiencies in the data supplied and renewed its demand for complete information. At the same time it requested the social security earnings of incentive employees. On March 6, the Company furnished an earnings and hours schedule of the incentive employees and told the Union to make its own computation of their hourly earnings (J.A. 728, 759; 596–606).

As of January and February 1960, the time of the Board hearing herein, the Company had not supplied the additional job descriptions or the seniority roster requested in 1958 (J.A. 729; 93–94, 9, 274, 588). A copy of the unilaterally instituted insurance policy was furnished the Union on June 4, 1959, after the Union in bargaining sessions in April and again on June 1 had demanded increased benefits thereunder (J.A. 729, 789; 70, 252, 672–673, 65–67).

B. THE PRE-STRIKE BARGAINING

On January 20, 1959, the Union timely notified the company that it desired to terminate the 1957 contract and negotiate a new one (J.A. 759; 607). On March 2, 1959, the Union submitted its contract proposal wherein it sought, among other things, increased wages, liberalized vacation benefits and the institution of paid holidays (J.A. 730, 762; 616–641). At the same time the Union requested the Company to select

[2] The charge which forms the basis for the instant proceeding was filed on June 29, 1959 (J.A. 545).

a date to begin contract discussions (*ibid.*). On March 17, receiving no reply, the Union, by telegram, again asked for a conference date (J.A. 642, 15–16). A meeting was arranged for March 23, two days before expiration of the old agreement, to be held in the Atlanta office of Frank Constangy, the Company's attorney (J.A. 763; 16).

At the March 23 meeting, Constangy announced that the Company had not yet fully studied the Union's proposals and suggested a 30-day extension of the existing agreement to afford the Company an opportunity to prepare counterproposals (J.A. 763; 354, 343, 17). The Union agreed to this extension and its chief negotiator, Botelho, inquired as to the Company's position with respect to wages (J.A. 763; 17–18, 355). Constangy was noncommittal, but agreed the Company would submit a detailed wage proposal with its contract proposals (J.A. 763; 355). The Union insisted that any wage increase be retroactive to March 25 and Constangy replied that this was a matter to be negotiated (J.A. 763; 17, 355). Shortly thereafter, Constangy and General Manager Clark met with Mark Horblit, one of the Company's chief stockholders and a member of its executive committee, and drafted the Company's counterproposals (J.A. 763–764; 356, 463, 460, 20).

The Company's contract proposal, without a wage schedule,[3] was submitted to the Union on April 4 (J.A. 764; 645–646). Unlike the expiring agreement, this

[3] The proposal merely contained a general wage provision, limiting wages to the wage pattern in textile mills in South Georgia (J.A. 771; 652–653).

proposed contract omitted the checkoff of union dues; leaves of absence for union business; the right of the parties, upon mutual consent, to amend the contract; the requirement of notice to the Union of proposed workload changes; the right of the Union to reopen wages; the provision barring discrimination against the Union or its members; and the provision for processing of pending grievances past contract termination. In addition, the Company proposed to lengthen the grievance procedure, remove workload disputes from the regular arbitration procedure, and limit the material to be presented at arbitration hearings. Further, the Company contract proposal would have subjected the Union to civil suits for unauthorized work stoppages; vested the employer with sole power to determine employee competence and qualification for job retention or layoff; and, by specifying that all jobs remain temporary until designated permanent by the Company, gave the Company the right to abolish jobs without negotiation and in disregard of earned seniority (J.A. 730; 560–578, 646–660, 35–48).

On April 6, although it had not yet presented to the Union a specific wage proposal, the Company posted a notice on the plant bulletin board. It advised the employees that a wage increase would be paid April 27, and expressed the hope that the Union would agree so that there would be no delay of the increase beyond that date (J.A. 764–765; 661).

A negotiation meeting was scheduled for the afternoon of April 10. That morning, in response to Union objections to the Company's proposals on arbitration, its general wage provision, and the duration of

checkoff. Constangy remarked that the decision on these matters could not be changed locally but only by higher management and suggested a meeting with Horblit in Boston, Massachusetts (J.A. 733, 766–767; 356–359, 423–424). Constangy further suggested that the scheduled afternoon session be postponed, but, when the Union would not agree, he stated his law partner, M. A. Prowell, would replace him at the meeting (J.A. 766; 359, 380–381). Prowell testified he "was to participate in the meeting for the purpose of allowing Mr. Botelho [the chief Union negotiator] * * * to explain * * * the Union's position on the Company's proposals" (J.A. 766; 381).

That afternoon the Company presented its detailed wage proposal, and also revealed that within the preceding 60 days it had unilaterally changed the duties and wages of the forklift driver (J.A. 734, 767; 149, 240, 503, 359–360, 177–178, 489–490). Clark pointed out that the Company's wage proposal was not an across-the-board increase but was based on incentive earnings (J.A. 735, 767; 25, 360, 26, 382). Botelho reviewed the Union and Company contract proposals, stated the Union position with respect to each provision, and indicated Union acceptance of at least six or seven of the 19 provisions in the Company proposal (J.A. 767–768; 384–390, 379, 489–492). The meeting adjourned after Prowell, without accepting any Union proposal or offering to modify those of the Company, stated he would submit to his seniors, for their consideration, the issues raised by the Union (J.A. 767–768; 385–390, 489–491, 27–29, 178–179, 433–

437). As he did after all bargaining sessions, Clark then reported on the meeting to Horblit (J.A. 732; 462, 482).

On April 13, the Company posted a detailed wage schedule on the plant bulletin boards. The notice attached stated that the posted wage scale, which was intended to be put into effect April 27, had been presented to the Union on April 10, and that the Company hoped the Union would agree and not delay the increase (J.A. 735-736, 768; 684). Shortly thereafter, employee Woodward was told by Foreman McDowell that the Union could not get a larger pay increase for the employees than that offered by the Company, and that if the employees wanted to keep their jobs they had better leave the Union alone (J.A. 736, 739, 796; 286-287, 289-290).

About April 20, Botelho met with Horblit in Boston. Botelho reviewed the Company and Union proposals and pointed out the problems faced by the Union in negotiations (J.A. 769; 110-111, 20-21). He told Horblit that local management was not bargaining in good faith and asked him, as owner of the Company, to look into the matter (J.A. 769; 21). Horblit promised to consult with another member of the Company's executive committee and transmit through Constangy any change in bargaining attitude (J.A. 769; 22). On his return to Georgia, Botelho was advised by Constangy that no word had been received from Horblit. A second bargaining session was arranged for April 24, with Prowell again scheduled to replace Constangy (J.A. 769; 111-112, 22-23).

The April 24 meeting opened with Botelho denouncing, as an attempt to undermine the Union, the Company's April 13 announcement of the intended wage increase. After heated discussion, the Company agreed to post a notice acceptable to the Union (J.A. 770; 391, 466–467). During the meeting the Union agreed to accept certain provisions as proposed by the Company, to accept other provisions from the old agreement in lieu of those in the Company's contract proposal, modified or reduced certain of its demands, and suggested specific wage rates for various job categories. However, the Company negotiators would accept no substitutions for their proposals, rejected each Union offer, and would make no counterproposals or concessions other than to state they would recommend that the Union be given access to the mill to investigate grievances and that it might be possible to settle two pending grievances (J.A. 730–734, 770–772; 392–399, 372–373, 112–115, 493–495, 433–437, 42). The Union was told that its "counter proposals" would have to be submitted to Company "higher ups" for any modification (J.A. 732–733; 494, 134–135, 432–436, 372–373, 410, 462, 480–482, 412, 363–364, 151, 27–29, 32, 37, 49, 51). The parties agreed to meet again on May 7, and the old agreement was extended until May 10 (J.A. 773, 667, 400).

Before adjourning, the parties also agreed on the wording of a notice to be posted in the plant advising the employees of the current status of the bargaining on wages (J.A. 737, 773; 467–468, 668, 173). However, immediately after the meeting, Clark, in Prowell's presence, called the plant and ordered the

posting of a different notice, reading as follows (J.A. 774; 664, 401–402, 443, 468, 450):

> To Employees:
>
> The Company and Union Representatives met in contract negotiations today and the Union refused to agree to the Company's wage proposal. The Union insisted that negotiations on wages be continued and therefore, the wage increase will not be put into effect as of Monday, April 27, 1959.
>
> Fitzgerald Mills Corporation
> By: E. O. Clark

About May 5, Botelho telephoned Constangy who advised that he had discussed with Horblit the Union proposals of April 24 and that it was apparent the Company was not going to move from its position (J.A. 774–775; 51, 363). Constangy testified he told Botelho that "maybe the Company [would] change its position" if the Union demonstrated its strength by a successful strike (J.A. 374–375). Botelho then attempted to reach Horblit directly by telephone but was told Horblit was not available for discussion (J.A. 775, 50–51). On May 6, by telegram, Botelho asked Horblit to call before the bargaining conference set for the next day, but Horblit did not respond (J.A. 775; 669, 51–52).

The May 7 bargaining meeting was brief. Constangy announced that the Company would not deviate from its original proposal, and Botelho replied he had no choice but to recommend a strike (J.A. 775; 53, 364–365, 115–116). Constangy then stated the Company would put its wage proposal into effect

May 11, to which action the Union refused to agree (J.A. 775; 365, 116). Later the same day, May 7, the Company notified the employees of the failure to reach agreement on a new contract, and that the proposed wage scale would be effective "immediately." The increase went into effect as of Monday, May 11 (J.A. 734, 776–777; 671–672, 406–407). Botelho again wired Horblit explaining that the attitude of the Company's negotiators compelled the Union to recommend a strike, but that the Union continued to be available for negotiations (J.A. 775–776; 670, 53).

On Saturday, May 9, Botelho met with about 130 employees. He described the course of the negotiations and the preceding events, and concluded that, "it was becoming increasingly apparent * * * that the Company did not want to bargain * * * in good faith" (J.A. 741, 779–780; 59–63, 245–246, 203–204, 262, 54–55). The employees voted unanimously to strike, and picketing began the following Monday, May 11 (J.A. 789; 63, 204). On May 12, the Union sent a letter to the employees charging the Company with unreasonable contract demands, an adamant position, and a bad faith bargaining attitude (J.A. 780–787; 687–698).

C. THE STRIKE AND POST-STRIKE BARGAINING

On May 22, 1959, during the strike, Clark, in a heated conversation near the plant gate, told an assembled group of some 20 strikers "to get the Union agitating s-o-b's out of Fitzgerald." Clark urged the strikers "to get a union of your very own." He added that, if the strikers came back to work, it would

be without a contract as he would "die and go to hell before [signing] a contract" (J.A. 799–800; 167, 193, 195, 288, 292–294, 297–298, 300, 312–313, 317–318, 321, 323, 325). When asked whether he contemplated "doubling up" the workload, Clark admitted "he planned to take three jobs and make two out of them" (J.A. 799–800; 326).[4]

The work assignments and wages of loomfixers had been discussed at the bargaining meetings prior to the strike, but no agreement had been reached (J.A. 767, 772; 256, 398–399). In June, while the strike was on and negotiations were continuing (see *infra*), the Company unilaterally changed the wages and workloads of loomfixers (J.A. 734; 129).

Negotiating sessions were held on June 1, July 1 and 10, under the auspices of a Federal mediator (J.A. 787–794; 64, 71, 75, 184–186, 128, 206–207). By the end of the July 1 meeting, the Union had accepted 10 of the Company's 19 contract proposals and had offered to accept two other provisions from the expired agreement (J.A. 788–792; 128–134, 406–409). Further, the Union agreed to the Company's wage proposal but asked for an additional 5 cents per hour after six months; reduced its demand for paid holidays from six to two; agreed to the Company's insurance program and its workload clause if modified by protections from the same provision in the

[4] Moreover, on at least two occasions thereafter, Clark addressed the non-striking employees in the plant. He told them he would not sign a contract with the Union except on his terms and that he would resign "before some of the [strikers] come back" (J.A. 737, 801–802).

old contract; and indicated it would drop its demand for a checkoff clause if agreement were reached on the other provisions (*ibid.*).

On Monday, July 6, Prowell notified Botelho that the Company rejected the Union's July 1 proposals and would not yield from its original contract offer. Botelho stated that he intended to end the strike and have the strikers apply for reinstatement. Prowell replied that only about 21 jobs were available and the strikers would be hired for those positions in their order of application without regard to whether their jobs had been filled or not (J.A. 793; 86–89, 412, 137, 139).

Thereafter a number of strikers were rehired to jobs formerly held by other strikers (J.A. 742, 793; 520–526, 712–726). When most of the strikers unconditionally applied for reinstatement on July 7 or 8, they were told there were no openings and to renew their applications weekly as they would be regarded as new employees (J.A. 762, 793; 698–703, 725–726, 517). On July 15, the Union's attorney, on behalf of all the strikers, made an unconditional offer of return to their former jobs (J.A. 795; 677–678, 284).

At a final meeting on July 10, Prowell announced that most of the strikers had been permanently replaced, that the replacements had been assured they would not lose their jobs because of the seniority of returning strikers, and that before any contract could be negotiated the Union would have to agree that:

> 1. Those strikers who have been permanently replaced have no rights under this Contract.

> 2. Those strikers who were permanently replaced and have been placed on other available openings shall have their seniority rights under this contract for future vacancies.

Bote, who refused to accept this proposal, stating he would not "bargain a working man's rights away" (J.A. 794; 413-416, 698, 92, 139-142, 207, 232, 249, 279-282). Thereafter all negotiations ceased (J.A. 794; 207-208, 93, 91, 140, 144, 415-416).

When employee Mildred Woodward, a striker who had been reinstated to a part-time job after the strike, asked Foreman McDowell for additional work, he said, "If [she] had not walked out [she] would have a regular job." He added, "I could have told you that after you became a member of the union, in fact, I tried to" (J.A. 739, 796-797; 287-288, 290).

II

THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded that the Company refused to bargain in good faith with the Union, and thus violated Section 8(a) (5) and (1) of the Act. In reaching this conclusion, the Board relied upon: (1) the Company's dilatory tactics and refusal to supply the Union with information; (2) the Company's adamant refusal to consider anything but its own contract terms; (3) the limited authority granted to the Company's negotiators; (4) the Company's unilateral acts during negotiation; (5) the posting of notices in the plant calculated to subvert the Union; (6) General Manager Clark's statements to employees after the strike began; and (7) the conditioning of

further bargaining upon the Union's acceptance of the Company's proposal of July 10 concerning the reinstatement and seniority rights of strikers (J.A. 728–739). The Board further concluded that the strike was in protest over the Company's bad faith bargaining, and that the Company therefore violated Section 8(a) (3) and (1) of the Act by denying reinstatement to certain strikers upon their unconditional application and requiring them to apply as new employees, and by reinstating other strikers without full seniority and other rights and privileges (J.A. 740–742). Finally, the Board concluded that the Company violated Section 8(a)(1) of the Act by the coercive statements of General Manager Clark and Foreman McDowell to employees (J.A. 739–740).[1]

The Board ordered the Company to cease and desist from the unfair labor practices found. Affirmatively, the Board ordered the Company to bargain with the Union upon request, to offer the striking employees full and immediate reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, to make them whole for any loss of wages suffered, and to post appropriate notices (J.A. 746–754).

ARGUMENT

I. The Board's finding that petitioner failed to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act, presents essentially a substantial

[1] The Board overruled the Trial Examiner who found the Company had bargained in good faith. The Board left the Trial Examiner's credibility findings undisturbed except in

evidence question. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 409–410. The court of appeals, after a careful review of the record, determined that there was ample evidentiary support for the Board's finding (Pet. 21–34). Accordingly, no issue warranting review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

2. There is no merit to petitioner's contention (Pet. 11–15) that the court of appeals exceeded its reviewing authority because it failed to remand the case to the Board for reconsideration after rejecting certain findings upon which the Board had relied. As shown (*supra*, pp. 14–15), the Board's ultimate conclusion that petitioner had refused to bargain in good faith rested on six subsidiary findings—i.e., that petitioner (1) engaged in dilatory tactics; (2) adopted an intransigent attitude at the bargaining table; (3) gave its negotiators only limited authority; (4) took unilateral action; (5) posted notices which were designed to undermine the Union; and (6) made clear through the statements of General Manager Clark that it had no intention of reaching agreement with the Union.[6]

one minor respect, J.A. 728, 739–740), but drew different inferences from the credited evidence. In these circumstances, the Trial Examiner's findings are entitled to no special weight. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 493–496; *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364.

[6] The Board also relied on the fact that the Company had insisted that the Union waive the reinstatement rights of the strikers (*supra*, p. 15). This condition was illegal only if the Company's other acts amounted to a refusal to bargain and the employees were thus unfair labor practice, rather than economic, strikers.

Each of these subsidiary findings in turn rested on a number of incidents which occurred preliminary to and during the bargaining negotiations. Although the court of appeals disagreed with the Board as to the correct interpretation or relevance of some of these incidents, it found that there was still enough evidence of illegal action to sustain, not only the Board's ultimate conclusion of bad faith bargaining, but also each of the subsidiary findings on which that conclusion was based.

Thus, to establish dilatory tactics, the Board relied on the Company's delays in furnishing wage and job descriptions, information on an employee insurance policy, and a seniority roster. The court of appeals, although disagreeing that there was an undue delay in furnishing the insurance and seniority information, agreed that there was an "unexplained delay to furnish even partial wage and job classification data" and concluded that this by itself was "substantial evidence" to support the Board's finding of dilatory tactics (Pet. 25-26). The Board's finding of Company intransigence in bargaining rested on the fact that it submitted a counterproposal which was harsher than the previous contract, and that it thereafter engaged in "surface bargaining" without any sincere desire to reach agreement. The court, although concluding that the terms of the counterproposal itself furnished no support for the Board's finding, agreed that the Company's conduct of the negotiations revealed that it had no intention of reaching agreement with the Union, and held that this furnished sufficient support for the Board's find-

ing of intransigence (Pet. 26–28). The Board's finding of unilateral action rested on the fact that the Company, while negotiations with the Union were pending, changed the wages and duties of the fork lift drivers and loomfixers and put into effect, on May 11, 1959, a general wage increase. The court, although dismissing the fork lift change as "insignificant," found that the general wage increase constituted "a deliberate attempt by the Company to deal individually with the employees, and convince them that all benefits would come from the Company's sole choice, thereby weakening the Union in its strike effort" (Pet. 30–31). Finally, the Board found that notices posted by the Company on April 6, 13 and 24 were designed to undermine the Union's prestige. The court, although rejecting the findings concerning the April 6 and 13 notices, concluded that the April 24 notice reflected an intent to subvert the Union and thus supported the Board's conclusion (Pet. 31).

Since the court of appeals, although disagreeing with the Board in certain respects, nevertheless found sufficient evidence of illegal action to support each of

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[1] Petitioner contends (Pet. 11) that the court erred in holding that the wage increase was violative of the Act, because it found, contrary to the Board, that an impasse had been reached in the bargaining. Although the court did state that "an impasse was reached on May 7" (Pet. 25), this was not a genuine impasse but one which resulted from the Company's bad faith bargaining up to that point. In short, the court's opinion is not inconsistent with the Board's finding (J.A. 734) "that no genuine impasse was reached on May 7, 1959, in view of the [Company's] bad faith bargaining." An impasse which results from a failure to fulfill the statutory obligation to bargain affords no justification for unilateral action.

the Board's subsidiary findings and its ultimate conclusion that the Company failed to bargain in good faith, it was clearly proper for the court to enforce the Board's order without remanding the case to the Board for additional findings. In these circumstances, a remand to the Board would be "a mere formality and a needless addition to an already overprolonged proceeding." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 427.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1963.